No. 04-35677

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVEL COMMUNICATIONS, INC., ET AL.,

Plaintiffs-Appellants,

versus

QWEST CORPORATION,

Defendant-Appellee.

On Appeal From the United States District Court
For the Western District of Washington
The Honorable Marsha Pechman
District Court Case No. C03-3680P

APPELLEE QWEST CORPORATION'S PETITION FOR PANEL REHEARING

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Pursuant to Fed. R. App. P. 40 and Circuit Rule 40-1, Defendant/Appellee Qwest Corporation ("Qwest") respectfully requests rehearing of the Court's June 26, 2006 Opinion (the "Opinion").

Two crucial aspects of the Opinion should be modified so that the Court does not conclusively decide either disputed factual issues or the FCC's intentions:

I. The Opinion held that the Waiver Order "supersedes" the filed tariff doctrine with respect to Qwest's intrastate tariffs at issue, but the Opinion does not expressly acknowledge that this legal conclusion is predicated on a disputed fact. *See* Opinion at 7049. Whether the Waiver Order actually applied to Qwest's tariffs is a factual question, depending on whether Qwest relied on the relief in the Waiver Order. Davel alleged in its Complaint that Qwest did so, and Qwest could not contest this allegation in its Rule 12 motion; but Qwest will vigorously contest this fact in the lawsuit and has already done so before the FCC. Davel, however, has already told the FCC that this Court has foreclosed Qwest from contesting this key fact, a result the Court could not have intended. The Court should modify the Opinion to clarify that its conclusion about the Waiver Order "superseding" the filed tariff doctrine is without prejudice to Qwest if Qwest successfully controverts Davel's factual allegations.

II. In concluding that the Waiver Order "supersedes" the filed tariff doctrine, the Opinion analyzes the effect of the Waiver Order without deferring to the FCC's superior expertise and to existing FCC proceedings already addressing the same issue. Opinion at 7055-57. By choosing to address the issue before the FCC does, the Opinion presages a potential nationwide schism, with AT&T, Verizon and some Qwest customers subject to the FCC's rule but, Davel will argue, with Appellants subject to this Court's analysis. This would perversely create the very lack of uniformity that primary jurisdiction was intended to avoid. *Id.* at 7054-55. Qwest will argue, on the other hand, that the FCC's analysis will supersede the Opinion pursuant to *National Cable & Telecomms. Ass'n v. Brand X*, ___U.S.___, 125 S. Ct. 2688 (2005) ("Brand X"), effectively rendering the Opinion merely advisory. To avoid both problems, the Court should refer to the FCC the question of whether in 1997 the FCC intended to render the filed tariff doctrine inapplicable to the relevant tariffs.

In addition to these two issues, the Opinion substantively misapprehends both the Waiver Order and regulatory law in two respects, each of which independently led to an incorrect conclusion. The Court should modify its Opinion and, for either reason, affirm the judgment of the District Court:

III. The FCC does not have the power to decide in Davel's favor the issue the Court refers to it, whether the "scope" of the refund in the Waiver Order.

The Opinion held that in 1997 the FCC contemplated only a limited refund. Opinion at 7043-44. Thus, the Opinion openly seeks the FCC's determination whether, based on ***current*** policymaking considerations, the Waiver Order should ***now*** be given an unlimited scope for years 1997 through 2002. The rule against retroactive ratemaking prohibits the FCC from now deciding to grant a refund to 1997. Although Congress provided narrow procedures that would allow the FCC to change a rate retroactively and order refunds, the FCC did not avail itself of these procedures. The Court's finding that in 1997 the FCC did not contemplate an open-ended refund resolves the merits of Davel's claims. Because the right to an open-ended refund did not exist in 1997, and one cannot now be created, the Court should affirm the District Court's judgment.

IV. Separately, the Opinion misapprehended the Waiver Order in stating that the Waiver Order "superseded" the filed tariff doctrine. At most, the Waiver Order "superseded" the filed tariff doctrine for a 30-day period if at all. No basis exists to conclude that the Waiver Order effectuated a silent rescission of the filed tariff doctrine in perpetuity. Rather, other aspects of the Waiver Order, and an FCC Order issued after the Opinion was released, demonstrate that the FCC expects these tariffs to be enforced like all other tariffs. The Court should conclude that the filed tariff doctrine is fully applicable here and accordingly affirm the District Court's judgment.

For these reasons, Qwest respectfully requests that the Panel grant Qwest's petition for rehearing.

SUMMARY OF ORDER AND SUBSEQUENT DEVELOPMENTS

The Opinion essentially consists of four holdings. First, the Waiver Order supersedes the filed rate doctrine, so the filed rate doctrine does not apply to Qwest's duly filed intrastate tariffs – a conclusion asserted unconditionally, without acknowledging that contested facts could affect that analysis. Opinion at 7048-49. Second, under the primary jurisdiction doctrine, the threshold issue of "the scope of the Waiver Order" should be referred to the FCC. *Id.* at 7054-57. Third, in referring this issue, the district court should consider whether to stay or dismiss the case without prejudice. *Id.* at 7058.[1] The Opinion also held that, until the FCC determines whether any refund is available for the period of 1997 through 2002, it is premature to determine whether it is appropriate to refer other issues to the FCC or state public utility/service commissions ("State Commissions"). *Id.* at 7057 n.8.

After the Court issued the Opinion, on July 7, 2006, the FCC issued a new order in the *Wisconsin* matter. *See In re Wisconsin Public Serv. Comm'n*, Order on Recon., __ FCC Rcd. __, 2006 WL 18809955 (July 7, 2006) ("*Wisconsin*

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[1] Fourth, and not at issue in this Petition, the statute of limitations does not bar certain of Davel's claims.

II"). Rejecting the Wisconsin Public Service Commission's request that the FCC review payphone access line ("PAL") tariff rates of two Wisconsin carriers, the FCC ordered that State Commissions must initially hear all challenges to PAL tariff rates. *Id.* at *1-2. The FCC held that its "action is consistent with the Commission's previously stated view that payphone line rates should, to the extent possible, be reviewed by the appropriate state commission." *Id.* at *2.

ARGUMENT

I. The Court Should Modify Its Opinion To Make Clear That Qwest Is Free To Factually Contest Whether The Waiver Order Applies To Qwest's Tariffs

The Opinion's analysis that the filed tariff doctrine does not apply to Qwest's PAL tariffs is premature and does not consider the procedural posture of Qwest's Rule 12(b)(6) motion. The Opinion held the filed tariff doctrine does not apply because the Waiver Order "supersedes" the filed tariff doctrine. Opinion at 7049. The basis for this conclusion is that the Waiver Order purported to "depart" from the filed tariff doctrine to permit the filing of new tariffs, in which case a refund would be available to customers for the "waiver period." *Id.* This analysis applies to Qwest only if it is factually established that Qwest ***relied*** on the relief granted in the Waiver Order by ***filing amended tariffs*** with lower rates during the Waiver Order's "limited" extension period. *Id.* at 7044 (refund only applies "[i]f a local exchange carrier relied on the waiver). If not established, the

Opinion would be incorrect in concluding that the filed rate doctrine is inapplicable to Qwest's tariffs. Opinion at 7049.[2]

Davel alleged in its First Amended Complaint that Qwest was one of the carriers that sought and relied on the relief granted in the Waiver Order. *See* E.R. 0004. Because this is an appeal of a dismissal under Rule 12(b)(6), this Court must assume this factual allegation to be true — but only to determine if Davel has stated a valid claim. Opinion at 7046. When reviewing disposition of a Rule 12 motion, the Court cannot decide a legal issue that depends on resolving a contested fact. *E.g.*, *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000) (antitrust claim depended on disputed facts thus legal issue could not be resolved in either party's favor on Rule 12 motion). In fact, all of Qwest's compliant tariffs for the services at issue were filed and effective before April 15, 1997, and the Waiver Order's extension of that deadline did not apply to these preexisting tariffs.

As a result, it is premature for this Court to hold that the Waiver Order "supersedes" application of the filed tariff doctrine to Qwest's tariffs, even if the

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[2] Qwest has contested this fact in a recent *ex parte* filings to the FCC. *See* Qwest *Ex Parte* to FCC, filed June 22, 2006, at 16-18 (arguing to FCC why Waiver Order does not apply to Qwest). Qwest respectfully requests that this Court take judicial notice of the relevant filings of Qwest and Davel to the FCC as part of the FCC proceedings, which are available from the FCC's website. Qwest is concurrently filing a separate request in this respect.

FCC intended that the Waiver Order have such an effect on the carriers who filed new tariffs during the waiver period. The Opinion should state that, at best, Davel might be able to claim that the filed tariff doctrine does not apply to Qwest's tariffs based on the factual allegations in the Complaint. But the Court should modify the Opinion to state that it cannot now determine whether the Waiver Order "supersedes" the filed tariff doctrine as it applies to Qwest's filed tariffs, because that issue depends on a contested threshold fact.

II. The Court Should Refer To The FCC The Issue Of Whether The FCC Intended The Waiver Order To Supersede The Filed Tariff Doctrine

The Opinion refers the "scope" of the Waiver Order to the FCC, but it does not refer — and instead decides — that the FCC intended the Waiver Order to "supersede" the filed tariff doctrine. Opinion at 7049. This issue too should have been referred to the FCC, which has primary jurisdiction to interpret ambiguities in its orders that would have significant policy-making effect on industry, just as the Opinion did on the "scope" of the Waiver Order. *See* Opinion at 7057. Because it is highly unlikely that the FCC intended to dismantle one of the most venerable of all telecommunications law doctrines without discussion, at best one could say the Waiver Order is ambiguous in its silence on this issue. *E.g.*, *National Fed. of the Blind v. FTC*, 420 F.3d 331, 337 (4th Cir. 2005) (when interpreting statute, court

presumes authors are aware of existing law and will not infer abrogation or inconsistency with existing law without "clear manifestation" of such intent).

Failing to refer the issue of the FCC's intent to the FCC could result in consequences this Court undoubtedly did not contemplate. Davel will argue — and indeed has already argued to the FCC since this Opinion was issued[3] — that it is "law of the case" between Davel and Qwest that the FCC intended to supersede the filed tariff doctrine with regard to the tariffs at issue. If the FCC were to conclude that the filed tariff doctrine fully applies to PAL tariffs (which is highly likely, *see* Part IV, *infra*), the FCC would decide the issue for all customers of AT&T and Verizon and some customers of Qwest; but Davel will argue that Davel and the other Appellants here are subject to this Court's differing analysis. The Opinion recognizes the importance of national uniformity, Opinion at 7054-55, yet the Opinion's analysis of the filed tariff doctrine could undermine that very policy. Congress required uniform national treatment of Qwest and the other Bell operating companies, *see* 47 U.S.C. § 276, and the Communications Act requires all of Qwest's customers to be treated equally without price discrimination, *see* 47 U.S.C. § 202(a) (and corresponding sections in every single state, *see* Qw. Brief at 21 n.6).

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[3] *See* Davel *Ex Parte* to FCC, filed July 6, 2006. Qwest attaches a copy of this *ex parte* to its concurrently filed Request for Judicial Notice as Attachment C.

Moreover, if the FCC decides the question differently from this Court's analysis, Qwest will argue that under *Brand X*, the FCC has authority to change a rule committed to its discretion even if an appellate court has previously resolved the issue in a contrary way. *See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d. 1056, 1070 (9th Cir. 2005) (applying *Brand X* and holding 2003 FCC order reversed conclusion of Ninth Circuit that Section 276 of Communications Act did not provide cause of action to payphone owners for underpaid compensation of 800-number calls from long-distance carriers), *cert. granted*, ___ U.S. ___, 126 S. Ct. 1329 (2006). The existing proceedings at the FCC likely make the Opinion, on this issue, at best advisory. Because a contrary conclusion by the FCC would abrogate any "law of the case" between Qwest and Davel, and because Davel undoubtedly will disagree and will contest this conclusion, substantial uncertainty and wasted judicial and regulatory resources would be avoided by referring the question.

These arguments, and the existence of multiple proceedings at the FCC already addressing the exact same question, could bog down this and other Courts for years and further delay a conclusion to this quagmire. Instead, the Court should refer to the FCC the question of whether it intended the filed tariff doctrine to apply to the PAL tariffs from 1997 to 2002, without running any risk of creating "law of the case" that conflicts with the law established for the entire

industry. No reason exists for this Court to step into the fray with a result affecting only one carrier and a tiny subset of the payphone service provider industry, where the FCC is resolving the same issue for the entire industry. As the Opinion notes, the doctrine of primary jurisdiction was created so courts would defer these kinds of highly technical policymaking decisions to expert regulators better suited to address the questions on a nationwide basis. Opinion at 7050-51.

For these reasons, the Court should vacate its discussion on pages 7048 and 7049 of the Opinion and instead refer to the FCC the question of whether the FCC intended the Waiver Order to supersede the filed tariff doctrine.

III. The Prohibition Against Retroactive Ratemaking Precludes The FCC From Resolving The Issue That The Court Referred To The FCC

The FCC has no authority to decide in Davel's favor the one issue that the Opinion did refer to the FCC: whether the Waiver Order's "scope" should include a refund from the period of 1997 through 2002. Given the Opinion's conclusion that in 1997 the FCC did not intend to provide an unlimited refund, Opinion at 7043-44, the Court should affirm the District Court's judgment.

Under the primary jurisdiction doctrine, the FCC would have the power to interpret any ***ambiguity*** in the 1997 Waiver Order regarding its intention, ***at the time***, to award ***prospective*** relief in the form of then-future rate changes in tariffs. Qw. Brief at 38-39. However, the Opinion concludes that the FCC, when

it wrote the Waiver Order in 1997, was not contemplating a refund beyond 30 days. Opinion at 7055-56. Davel's arguments to this Court use loose language in the Waiver Order, *see id.* at 7055, to open the door for the FCC to now construct a ***new*** policy based on ***current*** considerations — "beyond issues of initial FCC intent," *id.* — that would have the effect of providing refunds for the period of 1997 through 2002.

The Opinion's invitation to the FCC to rethink the Waiver Order under current considerations, if accepted, invites the FCC to engage in prohibited retroactive ratemaking. The FCC generally has no power to decide retroactively that a refund is appropriate for earlier time periods. As the Supreme Court stated, "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981).

Congress provided narrow circumstances under which the FCC may retroactively order refunds from a tariffed rate, but the FCC did not follow the procedures necessary to invoke that power here. For example, the FCC can issue a "suspension and accounting order," informing a carrier that its tariffed rates are under review and allowing the FCC at a much later time to revise the rates and order refunds. 47 U.S.C. § 204(a)(1). Without following this procedure, the FCC can correct unreasonable rates only on a prospective basis. *E.g.*, *Verizon Tel. Cos.*

v. FCC, ___ F.3d ___, No. 04-1331 & 04-1332, 2006 WL 1676161 (D.C. Cir. June 20, 2006) (no customer refunds for prior periods when FCC does not issue suspension order); *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992) (suspension order process protects carrier's interest by letting it "realize that the FCC's objections are well taken, or not worth a fight," and the carrier might "seek to bring itself within compliance and obviate the whole process"). Here, the FCC issued no suspension order to Qwest, so the FCC cannot now retroactively declare that Qwest's tariffs are not subject to the filed tariff doctrine.[4]

As a result, the issue the Opinion refers to the FCC is not one the FCC has authority to resolve, other than to conclude "no refund." The FCC cannot now decide what it ***should*** have done in 1997. Because the Court has already concluded that the FCC did not intend in 1997 for the Waiver Order to grant an unlimited right to a refund, Opinion at 7043-44, Davel cannot obtain such refund, nine years later, without violating the rule against retroactive ratemaking. Therefore, the Court should affirm the District Court's dismissal.

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[4] The FCC has no statutory authority to set aside retroactively a state tariff. Furthermore, in Section 276 Congress directed the FCC to regulate the RBOCs' PAL rates. If the FCC had required federal tariffs (as it initially did, until it reversed itself six months later), the FCC would be barred from retroactively revising rates outside of Section 204 procedures. The FCC cannot end-run Congress's deliberate limitations on its authority by choosing to have the tariffs filed at State Commissions in order to avoid application of Section 204.

IV. The Court Misapprehends Well-Established Regulatory Law And The Waiver Order In Concluding That The Filed Tariff Doctrine Does Not Apply

Finally, the Opinion's conclusion that the Waiver Order supersedes the filed tariff doctrine misapprehends the Waiver Order and regulatory law. The Court should vacate this portion of the Opinion and instead conclude that the filed tariff doctrine applies to all PAL tariffs, so Davel has no cause of action for a refund in federal court. This conclusion is a second reason, independent of the foregoing argument, to affirm the District Court's judgment

The Opinion held that the Waiver Order is "not consistent with a strict application of the filed-rate doctrine." Opinion at 7049. The Opinion noted that statutes or regulations can be enforced even if the effect is to avoid the filed tariff doctrine. *Id.* at 7048.[5] On that basis, the Opinion concluded that the filed tariff doctrine does not apply to the PAL rates the FCC required to be filed. *Id.* at 7049. This novel conclusion does not follow from the Waiver Order or from the authorities the Opinion cites.

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[5] None of the cases the Opinion cites for this proposition is even remotely similar to the circumstances here, that is, where an agency purportedly required the filing of tariffs but did not intend the filed tariff doctrine to apply to them. In *Verizon Del., Inc. v. Covad Comm'ns Co.*, 377 F.3d 1081 (9th Cir. 2004), the FCC exercised a statutory "forbearance" authority to remove certain services from tariffs into a detariffed regime. *Verizon Del.* recognized that "forbearance" required specific FCC findings in order to invoke the statutory power. *Id.* at 1989. The FCC has never invoked that authority here, however (even if it could).

If the Waiver Order is deemed to have any effect at all on the filed tariff doctrine,[6] at most one could say that the Waiver Order superseded the filed tariff doctrine for the "limited" and "brief" duration of the relief granted in the Waiver Order — a 30-day period in April and May, 1997. Nowhere in the Waiver Order does any language suggest that the FCC intended that the filed tariff doctrine would not apply to filed tariffs after that "limited" and "brief" period. Indeed, the Opinion itself acknowledges that the FCC did not contemplate the Waiver Order to apply to tariffed rates after this period. Opinion at 7043-44. Modifying or, as the Opinion holds, superseding the filed tariff doctrine for 30 days does not mean the doctrine is thus rendered inapplicable in perpetuity.

Many other facets of the Waiver Order demonstrate that the FCC fully intended the filed tariff doctrine (particularly as articulated by state law) to apply to the PAL tariffs at issue. The FCC did not "detariff" PAL services, as it has done with other kinds of communication services, but required tariffs to be filed. Opinion at 7047-48. No language in the Waiver Order, nor any precedent, supports concluding that the FCC requires tariff filings but does not intend that the filed tariff doctrine apply to those tariffs. The conclusion that these filed tariffs are not covered by the filed tariff doctrine creates a *sui generis* tariff, the first ever

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6 Qwest disagrees that the Waiver Order is inconsistent with the filed tariff doctrine for even the 30-day period, but that issue is not relevant to the instant appeal because Davel is not seeking a 30-day refund.

created in over a century of regulatory law before the FCC, the Interstate Commerce Commission, the Federal Energy Regulation Commission, and others. Surely such a novel and unique quasi-"tariff" would have been initiated with more analysis and legal support than appears in the Waiver Order. Further, because no industry member challenged the Waiver Order, it is reasonable to conclude that no carrier or customer read the Waiver Order to depart from a century of the filed-tariff regime that lies at the "heart" of the industry. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229, 231 (1994).

The Opinion's conclusion is further undermined by subsequent events. In the subsequently-released *Wisconsin II* order, rather than indicating that the filed tariff doctrine would ***not*** apply, the FCC once again expressly required state tariff procedures to apply to the tariffs at issue here. State filed tariff doctrines are as longstanding and entrenched as federal filed tariff doctrines; under the dichotomy created by Section 2 of the Communications Act of 1934, 47 U.S.C. § 152, states have traditionally enjoyed primary authority over intrastate communications. It would be highly irregular for the FCC to rely upon existing and well-established state tariff mechanisms as a matter of "federal-state comity," but intend that the most fundamental pillar of those mechanisms — state filed tariff doctrines — would not apply. *See In re Wisconsin Public Serv. Comm'n*, Mem. Op. & Order, 17 FCC Rcd. 2051, 2056 ¶ 15 (2002). The Court should not

conclude that the FCC intended to abrogate the existing state-law filed tariff doctrines without clear evidence of that intention. *National Fed. of the Blind*, 420 F.3d at 337. The Opinion offers no support, either in the text of the Waiver Order or elsewhere, for the conclusion, that the FCC deferred to only a portion of state laws and procedures and did so *sub silencio*. Given the Waiver Order's brevity, such a conclusion cannot be correct.

For these reasons, the Court should vacate its discussion on pages 7048 and 7049 of the Opinion, and instead conclude that the filed tariff doctrine is fully applicable to Qwest's state-filed tariffs. The District Court therefore appropriately dismissed Davel's claims as barred by the filed tariff doctrine. The Court should not remand this matter, but should instead affirm the District Court's judgment.

CONCLUSION

Because Qwest has demonstrated that the Court should rehear the matters addressed in its Opinion, Qwest respectfully requests alternatively that the Court: (1) affirm the District Court's Order (for the reasons stated in Parts III and IV, *supra*); (2) modify its analysis of the Waiver Order's effect on the filed tariff doctrine to state that it depends on a contested issue of fact (*see* Part I, *supra*); and/or (3) refer to the FCC the issue of whether the FCC intended in 1997 for the

Waiver Order to "supersede" the filed tariff doctrine beyond the limited period of the extension at issue there (*see* Part II, *supra*).

Dated: July 17, 2006

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing is:

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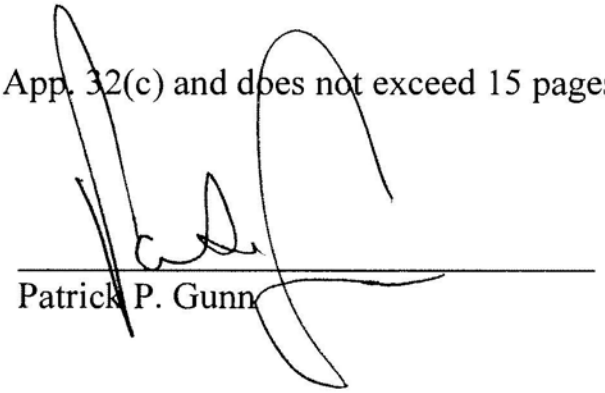

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CERTIFICATE OF SERVICE

I certify that on July 17, 2006, copies of the foregoing APPELLEE QWEST CORPORATION'S PETITION FOR PANEL REHEARING were served via electronic mail and first class mail on the following:

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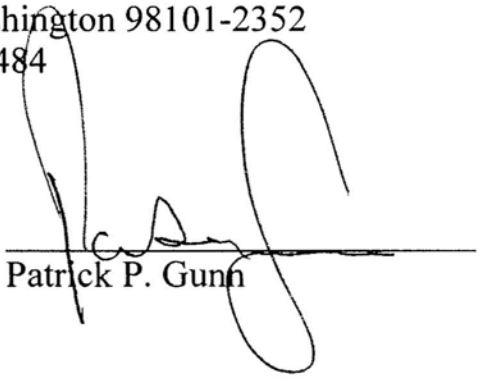

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